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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

VOLVO FINANCIAL SERVICES, Plaintiff and Respondent, v. MOHAMMAD REZA ARBABI, Defendant and Appellant.	B225868 (Los Angeles County Super. Ct. No. BC383452)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kevin C. Brazile, Judge. Affirmed.

James A. Frieden for Defendant and Appellant.

Gordon & Rees, Benjamin T. Morton and Richard R. Spirra for Plaintiff and Respondent.

INTRODUCTION

Appellant appeals from summary adjudication against him on a continuing guaranty found by the trial court to have been signed by appellant, Mohammad Reza Arbabi (Arbabi), and enforceable in favor of respondent, Volvo Financial Services formerly known as Volvo Commercial Finance (Volvo).

Appellant contends (1) there is a dispute of material fact about whether the guaranty was properly executed or delivered; (2) even if appellant is held liable on the guaranty, he can only be charged with the unpaid balance on the first advance because the terms of the continuing guaranty required Volvo to notify him of its intention to make new advances; and (3) the implied covenant of good faith and fair dealing requires lenders notify guarantors when lenders intend to make new loans covered by a continuing guaranty. We disagree and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 2003, Al Harvey and Arbabi adopted and ratified an operating agreement for IVA Equipment, LLC. Harvey and Arbabi were the only two named members of this company. On October 30, 2003, Arbabi completed and signed a credit investigation authorization providing Volvo the information and authorization needed to determine his creditworthiness.

On or about November 19, 2003, Volvo entered into a loan with IVA Equipment (IVA) in the amount of $151,341 for the finance and purchase of construction equipment through Mathews Machinery, seller of the equipment which was security for the loan. In connection with this loan Volvo required a personal guaranty. As a result of Volvo's requirement for a personal guaranty, Arbabi executed and delivered to Volvo the written *continuing guaranty* dated November 19, 2003. Arbabi guaranteed payment of all the obligations of IVA then owing or thereafter incurred, together with accrued interest, costs and attorney fees incurred in the collection and enforcement of said continuing guaranty.

In reliance on Arbabi's continuing guaranty, Volvo extended credit to IVA. In addition to the first loan in the amount of $151,341 made on November 19, 2003,

subsequent loans were made by Volvo to IVA as follows -- November 2, 2004 in the amount of $150,093; August 9, 2005, in the amount of $177,438; and February 28, 2006 in the amount of $65,295. Volvo did not notify Arbabi at the time it made the subsequent loans, rather it relied on the continuing guaranty which it had on file. IVA defaulted under the terms of the loans by failing to remit payments due.

On September 2, 2009, Volvo filed its verified amended complaint alleging, inter alia, breach of continuing guaranty. Arbabi answered the complaint claiming, among other things, he did not execute the guaranty, the guaranty was never delivered to Volvo and the guaranty was procured by fraud. On December 9, 2009, Volvo filed a motion for summary adjudication of the breach of guaranty cause of action against Arbabi and the matter was heard. The trial court found Volvo presented undisputed evidence establishing Arbabi signed the continuing guaranty and IVA failed to repay the loans as required under the loan contracts.

Arbabi filed a timely appeal. On appeal, Arbabi argues the evidence he submitted was sufficient to raise a triable issue of fact as to whether he knowingly signed the guaranty and whether the guaranty was properly witnessed and delivered to Volvo. We treat the summary adjudication, in this instance, as the granting of a motion for summary judgment and thus as an appealable order because it dealt with all claims against Arbabi.

Standard of review.

Volvo contends that there is no dispute concerning the standard of review to be applied in this instance. We agree. Volvo states: "There is no dispute between the parties concerning the applicable standard of review. In determining whether the trial court properly granted a motion for summary adjudication, the Court of Appeal applies the *de novo* standard of review. [(]*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972; *Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 Cal.App.4th 1376, 1385.[)] 'We apply the same three-step analysis required of the trial court. First, we identify the issues framed by the pleadings since it is these allegations to which the motion must

respond . . . . Secondly, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor . . . . When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.' [(]*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502-503.[)]

"Volvo Financial agrees with Mr. Arbabi that, in determining the parties' rights and obligations under the guaranty, North Carolina substantive law is to be applied because the guaranty contains a clause that provides that the guaranty is to be governed by North Carolina law."

Volvo maintains that the issues presented for review are more clearly focused by narrowing those issues down to three in number by posing the following questions:

1. Does the evidence presented to the trial court raise a triable issue of fact as to whether Mr. Arbabi signed the personal guaranty?
2. Does the fact that the second witness did not actually view Mr. Arbabi signing the guaranty relieve Mr. Arbabi of the obligations he assumed?
3. Under the current law of North Carolina, does a lender have an implied obligation to provide advance notice of each new loan to a guarantor who enters into a continuing guaranty?

With the aforementioned agreements and concessions in mind, we proceed to an analysis and decision on the issues presented for resolution by this court.

DISCUSSION

The text of the guaranty.

Our analysis begins with an examination of the text of the guaranty in question.

As contended by Arbabi, the guaranty in question was prepared by Volvo and sent to Mathews Machinery, the seller of the equipment which was security for the loans. The continuing guaranty read as follows:

"VOLVO COMMERCIAL FINANCE – Continuing Guaranty
"Customer No. 5058148

"For valuable consideration, each of the undersigned ('Guarantor'), jointly and severally unconditionally guarantees to Volvo Commercial Finance, a division of VFS US LLC and its affiliates and subsidiaries (each individually a 'Creditor') the full, prompt, and complete payment and performance of all obligations of all sums, moneys, notes, loans, indebtedness, leases, or lease payments that shall at any time be due and payable to the Creditor and its successors and assigns, from IVA Equipment, LLC. DBA Big Iron Rental ('Debtor'), whether now owing or hereafter contracted, absolute or contingent, including all liabilities or obligations that Debtor has incurred or may incur or from other dealings by which the Creditor may become in any manner a creditor of Debtor (collectively the 'Obligations').

"This Guaranty is a continuing guaranty and shall not be considered wholly or partially satisfied by the payment at any time of any sum or amount, due or hereafter owing upon any Obligation, but shall continue until terminated by written notice actually received by the Creditor and shall then continue, notwithstanding such termination, as to any Obligation created or incurred by Debtor prior to such receipt of termination.

"To the extent permitted under applicable law, Guarantor waives: (i) notice of acceptance, all notices and consents of any kind, protest, dishonor, non-payment, and demand for presentment; (ii) until the Obligations are irrevocably paid in full any claim, right, or remedy which Guarantor may now have or hereafter acquire against Debtor including the right of subrogation; and (iii) all exemptions and defenses given to sureties and guarantors other than the complete fulfillment, performance, and payment of all Obligations.

"The liability of each Guarantor is direct and unconditional. Guarantor acknowledges that the Creditor would not have entered into any transaction with Debtor without this Guaranty and that the Obligations are of substantial benefit to Guarantor. The Creditor may proceed against each Guarantor without resorting to any other right, remedy, security, or entity. All of the Creditor's remedies for the Obligations or this Guaranty are cumulative. Guarantor agrees that the Creditor may extend any deadline or payment due date, modify any agreement, defer acceleration, postpone the enforcement of any agreement, and release or add any collateral and any party primarily or secondarily liable without affecting the liability of any Guarantor. There are no conditions precedent to this Guaranty.

"Guarantor represents and warrants to the Creditor that . . . this Guaranty has been duly executed, authorized, and delivered and is enforceable against Guarantor in accordance with its terms. In the event of any dispute regarding this Guaranty, Guarantor

agrees to pay all costs and expenses of the Creditor, (including reasonable attorneys' fees and expenses) incurred in connection with such dispute, regardless of whether litigation or other action is instigated.

"This Guaranty constitutes the entire agreement of the Guarantor regarding the guaranty of Debtor's Obligations. No amendment, modification, or waiver of any provision of this Guaranty shall be valid unless in writing and executed by an officer of the Creditor. This Guaranty shall extend to and bind the heirs, executors, administrators, successors, and assigns of each of Guarantor and the Creditor.

"This Guaranty shall be governed by the internal laws of the State of North Carolina. Any provisions contrary to, prohibited by, or invalid under applicable laws or regulations shall be revised to the minimum extent necessary to make such provision enforceable, but shall not invalidate the remaining provisions of this Guaranty. Time is of the essence of this Guaranty.

"Print Name: Mohammed Reza Arbabi
"Address: 17950 Parthenia St. Northridge, CA 91325
"SSN: [xxx-xx-2662] Date: 11/19/2003
"Signature of Guarantor:[Line and text with signature of Mohammet Reza Arbabi]

"Signature(s) of Guarantor(s) are required to be either notarized or witnessed by two (2) witnesses
"Witness[es]: [Signatures of witnesses Jim Harrison and Michael Mathews]
"Print Name[s]: [Lines and printed names Jim Harrison and Michael Mathews]"

Evidence presented by Volvo in support of its motion.

It should be noted that Arbabi does not challenge Volvo's claimed undisputed material facts (numbered 1-17) establishing that Volvo made four loans to IVA. However, Arbabi challenges the evidence set forth in the undisputed material facts (numbered 18) by stating he "denies signing and delivering the Continuing Guaranty."

In contending that none of Arbabi's arguments has any merit, Volvo summarizes the evidence presented to the trial court in support of its motion and arguments thereon as follows: "In support of its motion, Volvo Financial submitted [¶] – a Credit Investigation Authorization that Mr. Arbabi admitted he filled out and signed that authorized Volvo Financial to obtain information concerning Mr. Arbabi's finances for the purpose of evaluating his creditworthiness . . . ; [¶] – a copy of the personal guaranty bearing a

signature that appears virtually identical to Mr. Arbabi's signature on several checks and three verifications he signed in this case . . . ; [¶] – copies of the checks and the verifications signed by Mr. Arbabi . . . ; [¶] – the declaration of a forensic handwriting expert [Frank Hicks] who testified that, based on his comparison of the signature on the guaranty with the known signatures of Mr. Arbabi, he was ***certain*** that the signature on the guaranty was Mr. Arbabi's signature . . . ; [¶] – a portion of Mr. Arbabi's deposition transcript in which he admitted that the signature on the guaranty appeared to be his signature . . . ; [¶] – a portion of the deposition transcript of James Harrison, who testified he saw a man who identified himself as Mr. Arbabi sign the guaranty . . . ."

We now address the three questions posited by Volvo, seriatim:

1. *Does the evidence presented to the trial court raise a triable issue of fact as to whether Mr. Arbabi signed the personal guaranty?*

We conclude that it does not for the following reasons: Volvo Financial submitted sufficient evidence to make a prima facie showing that Mr. Arbabi signed the guaranty. Mr. Arbabi claimed *he did not recall* whether he signed the guaranty and he admitted the signature on the guaranty looked like his signature. As noted in *DiLoreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 160-161, where a party seeking summary judgment submits a written agreement containing a signature that the opposing party does not *unequivocally* deny is his, the opposing party's statement he "does not recall" signing is not sufficient to create a triable issue of fact whether he knowingly entered into the agreement.

Here, Arbabi admitted the signature could be his and his declaration failed to indicate he did not sign the guaranty. Rather, he argues the circumstances surrounding the purported signing were suspect (ie. he never met an individual named Jim Harrison who purportedly witnessed his signature and he was not in California on the date of the alleged signing of the guaranty). However, Volvo offered as evidence the declaration of Frank Hicks, a forensic document examiner, who declared the signature appearing on the continuing guaranty when compared to a known sample signature of Arbabi's was certainly the signature of Arbabi. Volvo also offered the deposition testimony of Jim

Harrison, one of the witnesses to the signing, who recalled someone identified as Arbabi signing the document in his presence.

"When opposition to a motion for summary judgment [or adjudication] is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork." (*DiLoreto, Inc. v. O'Neill, supra,* 1 Cal.App.4th at p. 161.) Thus, we conclude, Arbabi's inference that he did not sign the continuing guaranty is not reasonably deducible from the evidence and is insufficient to create a triable issue of fact whether he entered into the written continuing guaranty.

2. Does the fact that the second witness did not actually view Mr. Arbabi signing the guaranty relieve Mr. Arbabi of the obligations he assumed?

We conclude that it does not for the following reasons: The failure to procure two witnesses who actually viewed the signing was simply a failure on the part of Mathews Machinery to comply with *Volvo's* requirement for verifying the guarantor's signature. It was undisputed that one of the two persons who signed the guaranty as a witness was not present when it was signed. As a result, Arbabi contends on appeal there is a dispute of material fact over whether the continuing guaranty came into force and effect because of the defective witnessing of the document.

We find, however, noncompliance does not mean the guaranty never came into effect (ie. there was never a contract). The fact the signing of the continuing guaranty was not witnessed by two people does not relieve Arbabi of his obligations under the guaranty. Significantly, Arbabi did not submit evidence to support his contention he is relieved of the obligations he assumed. We also note Arbabi executed a credit investigation authorization allowing Volvo to investigate his credit and financial history and Volvo fully performed its obligations under the contract. Accordingly, failure to have Arbabi's signature witnessed by two witnesses at the time of the signing does not imply he did not enter into the continuing guaranty.

Moreover, in support of its motion Volvo submitted into evidence the declaration of Tara Maxey, recovery manager for Volvo, who explained the requirement of two witnesses was implemented to *protect* Volvo Financial. Maxey acknowledged "The Guaranty states that 'Signatures of Guarantors are required to be either notarized or witnessed by two (2) witnesses.' *This is not a prerequisite to enforcing the instrument but rather a safeguard to ensure [Volvo] that the guaranty it is relying upon to extend credit was executed by the guarantor. In short, it's a requirement to protect the Plaintiff/Creditor*." (Italics added.)

Arbabi further contends the witness requirement must be interpreted against Volvo and in his favor because Volvo drafted the agreement. We disagree. The North Carolina cases cited by Arbabi state the rule is applicable where a contract clause is *ambiguous* (*Joyner v. Admas* (1987) 87 N.C.App. 570, 576 and *Root v. Ins. Co.* (1968) 272 N.C. 580) and the purpose of the rule is to ensure a party to an adhesion contract is not surprised by, or unaware of terms in the contract whose meanings are obscure or uncertain. Here, however, the provisions of the guaranty are not ambiguous. The continuing guaranty is a single page. The fact that there were not two witnesses at the time of the signing does not provide a basis for relieving someone who did sign the guaranty from liability for the obligations assumed. Thus, we conclude Arbabi's contention the continuing guaranty never came into force is without merit.

3. Under the current law of North Carolina, does a lender have an implied obligation to provide advance notice of each new loan to a guarantor who enters into a continuing guaranty?

We conclude the answer is no for the following reasons: The guaranty expressly provides that the substantive law of the state of North Carolina is to govern the guaranty and as conceded by Mr. Arbabi, both North Carolina and California law provide that a lender does not have an obligation to notify the guarantor on a *continuing* guaranty in advance of each new occasion on which the lender makes additional loans secured by the guaranty, except in limited situations specifically not applicable here (ie. when the lender

knows of facts that increase the risk the principal debtor is unlikely to repay the debt and the lender knows the guarantor is not likely to learn of those facts). Here, the continuing guaranty signed by Arbabi does not expressly require the lender to notify the guarantor of subsequent loans. In fact the continuing guaranty specifically stated the Guarantor waives all notices of any kind.

Arbabi urges this court to change the law to require lenders to provide notice to guarantors of intentions to make new loans or advance of funds covered by a guaranty. This we cannot do. It is the function of the legislature to enact laws it believes to be appropriate.

We conclude, therefore, in the absence of a provision in the guaranty expressly stating lender will provide notice of subsequent loans, the guarantor has neither a right to nor a reasonable expectation the lender will provide such notice. Furthermore, in light of the fact Arbabi states he cannot recall even signing the guaranty he certainly cannot and does not assert he actually had an expectation he would receive such a notice. Accordingly, the trial court did not err in granting the motion for summary adjudication in favor of Volvo and against Arbabi.

DISPOSITION

The judgment is affirmed. Respondent entitled to costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**